IN THE MATTER BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENEL NORTH AMERICA, INC.,

Employer,

And

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245,

Petitioner.

CASE NO. 32-RC-259399

EMPLOYER'S REQUEST FOR REVIEW

Steven M. Bernstein
FISHER & PHILLIPS LLP
101 E. Kennedy Blvd.
Suite 2350
Tampa, FL 33602
Tel: 813-769-7500
Fax: 813-769-7501

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENEL NORTH AMERICA, INC.	)	
	)	
Employer,	)	
	)	
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EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, as amended, Enel North America, Inc. ("Enel" or "the Employer"), by and through its undersigned counsel, Fisher & Phillips LLP, timely files this request for review of Regional Director Valerie Hardy-Mahoney's Decision and Direction of Election ("Decision") issued May 21, 2020.[1]

I. PRELIMINARY STATEMENT

Enel is a national provider of electrical power from renewable sources. The Employer operates a number of power plants throughout the U.S., including a pair of geothermal[2] facilities in the vicinity of Fallon, Nevada (referred to as "Stillwater" and "Salt Wells"), along with a separate facility located 450 miles away in Beaver, Utah (referred to as "Cove Fort"). Enel remotely monitors these operations via a control room in Stillwater, with support from several technicians based out of that location[3] and Cove Fort.

[1] All dates herein shall refer to calendar year 2020 unless otherwise indicated.
[2] The Employer also operates a trio of solar power plants adjacent to the Stillwater facility.
[3] At the time of the hearing, the Employer had temporarily stationed some technicians at Salt Wells solely for purposes of maintaining adequate social distancing protocols during the COVID-19 pandemic.

Specifically, the record shows that at the time of the hearing, Enel employed a total of sixteen employees performing these functions, including: five control room operators (scheduled on a continuous basis across multiple shifts) and eleven technicians (consisting of two plant technicians, three mechanical technicians and four electrical technicians) stationed at Stillwater, along with one plant technician and one mechanical technician assigned to Cove Fort. (Decision, pp. 1-2). On April 21, 2020, the International Brotherhood of Electrical Workers Local Union 1245 ("Petitioner," or "the Union") petitioned to represent a bargaining unit consisting of 16 employees across both the Stillwater and Cove Fort locations. In its petition, the Union requested an election by way of mail ballot. (Board Exh. 1(a)).

On April 29, Enel filed a position statement opposing the petitioned-for unit, "to the extent it purports to include those technicians who are domiciled at the Employer's Cove Fort, Utah facility, which lies over 450 miles from its Fallon, Nevada operations" and on the basis that, "The facts in this case do not support a multi-site unit." The Employer went on to assert that, "petitioner's request for a mail ballot election is inappropriate in this case, and that granting that request would represent an abuse of Regional discretion." (Board Exh. 3).

A telephonic hearing was convened on April 30, 2020 before Hearing Officer Paloma Loya. At the outset of the hearing, the Employer made clear that the petitioned-for unit was inappropriate to the extent it purported to include technicians at the Employer's remote Cove Fort location, and that the only appropriate unit was one confined to its operations in Stillwater and (on a temporary basis) Salt Wells. (Tr. 12).

Enel subsequently presented the testimony of Employer representative Brad Platt, Senior Director for Operations and Maintenance, along with a substantial number of documentary exhibits, for purposes of bolstering its argument that a multi-site bargaining unit was wholly

inappropriate under the circumstances of this case, as was the direction of a mail ballot election. Petitioner countered by presenting testimony from employee witness Luke Beaumont, a plant technician assigned to Cove Fort.

On May 21, 2020, the Regional Director issued her Decision, which directed a mail ballot election among a single multi-facility bargaining unit that included both[4] Cove Fort technicians. In so holding, the Regional Director found the presence of common skills, duties and working conditions, functional integration, and common supervision. (Decision, pp. 5-7).

The Regional Director, however, acknowledged that Stillwater and Cove Fort have separate operating budgets and supply power to different customers. (Decision, p. 3). She also made clear that Cove Fort technicians participate in common functions with their Stillwater counterparts on no more than an annual basis, and that Stillwater technicians travel to Cove Fort no more than "two to three times per year." (Decision, p. 4). The Regional Director found that it is even more rare for Cove Fort technicians to travel to Stillwater to assist with work projects, which had "occurred once or twice in the last eight years." (Decision p. 4). She further found that "temporary interchange between Stillwater and Cove Fort technicians typically will not occur," and that permanent interchange had last taken place "approximately five years ago." (Decision p. 4). Nonetheless, the Regional Director found the lack of contact and interchange to be no less than a "neutral factor." (Decision, p. 7).

With respect to geographic proximity, the Regional Director noted that the 450 miles separating the two facilities "takes approximately seven-and-a-half hours" to cover when traveling by road. (Decision, p. 5). She also acknowledged that, "The distance involved is greater than the

[4] It's worth noting that this decision proved to be significant and potentially determinative, to the extent that the final tally of ballots was in favor of union representation by the narrow margin of 7 to 6, among a unit that consisted of 15 (rather than 13) eligible voters. The Region certified those results on July 1st.

Board has typically addressed in making multi-facility determinations," and that "[s]uch a significant distance between employees would typically weigh against finding a community of interest between the petitioned for employees." (Decision, pp. 6, 7) (citations omitted). The Regional Director even went so far as to recognize that the "significant distance between Stillwater and Cove Fort…limits temporary interchange between the facilities." (Decision, p. 8).

Nonetheless, the Regional Director chose to downplay the substantial distance between the two operations as a function of the "remote nature of the facilities in question," finding that the extreme geographic separation was outweighed by what she deemed "a community of interest sufficient to make the petitioned-for multi-facility unit appropriate." (Decision, p. 8). In reaching this erroneous decision, the Regional Director disregarded Board precedent rejecting multi-site units in the absence of geographic proximity and temporary or permanent interchange, committing prejudicial error in her conclusions of law and the underlying finding of facts.

Within her Decision, the Regional Director also directed a mail ballot election in the face of overwhelming evidence establishing that a manual ballot election was appropriate under the circumstances. (Decision, pp. 8-10). In so doing, she committed an abuse of administrative discretion and disregarded controlling Board precedent. Even assuming *arguendo* that the Decision was a proper exercise of such discretion, the Employer submits that there are compelling reasons for reconsideration of this issue as a matter of Board policy.

II. GROUNDS FOR REQUEST FOR REVIEW

The Board will grant a request for review on one or more of the grounds that:

(1) A substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) There are compelling reasons for reconsideration of an important Board rule or policy.

§ 102.67, Rules and Regulations. Here, Enel seeks review of the Regional Director's Decision on the first, second and fourth grounds.

First, the facts show that in directing a multi-site election among facilities separated by such vast distances – free from any compelling evidence of substantial temporary or permanent employee interchange or bargaining history – the Regional Director rendered a decision that departs from extensive and controlling Board precedent. Along the way, the facts show that she also disregarded substantial record evidence mitigating against any finding of community of interest, while prejudicially disregarding the absence of employee interchange.

In so holding, the Regional Director also relied upon a series of erroneous factual findings that neglected to take into account the distinct plant designs and related factors separating the two facilities at issue, along with the requisite training, skills and qualifications separating technicians responsible for servicing equipment at those locations – further prejudicing the rights of the Employer in this case.

Lastly, the facts show that the Regional Director abused her discretion in directing a mail ballot election – erroneously departing from Board precedent that itself calls for reconsideration of underlying policy governing the administration of representation elections.

III. FACTUAL BACKGROUND

A. Operational Overview

The Employer supplies renewable energy services (including geothermal and solar power) by way of multiple plants throughout the United States. (Tr. 18, lines 3-4). Geothermal plants utilize hot water (rather than coal or natural gas) as their primary heat source. (Tr. 28, lines 25).

A separate work fluid is then utilized to fuel a turbine that ultimately drives a generator that creates electric power. (Tr. 28, lines 23-25). Once the water passes through the plant, it is essentially reinjected into the ground as a renewable source. (Tr. 25, lines 1-10).

During the hearing, the Employer offered extensive testimony regarding the nature of geothermal plant operations at Cove Fort, along with each of the Fallon, Nevada-area facilities (Stillwater and Salt Wells). (Tr. 20, lines 13-19). Stillwater lies approximately 7 to 8 miles from Salt Wells, and approximately 450 miles from Cove Fort. (Tr. 20, lines 22-24).

As Mr. Platt explained, the Stillwater location houses a control room that monitors operations across all three facilities, along with adjacent solar plants.[5] (Tr. 19, lines 18-25; tr. 22, lines 4-24; tr. 58, line 24). At the time of the hearing, five control room operators were regularly assigned to the Stillwater control room across two rotating shifts on a continual basis. (Tr. 27, lines 18-25; tr. 32, lines 2, 11-12, 22; tr. 33, lines 5, 18). They are responsible for monitoring data readings and generally overseeing powerplant operations, and report directly to Control Room Manager Jonathan Hauptfuhrer. (Tr. 19, lines 15-19; tr. 27, lines 23-25; tr. 28, lines 1-5). Cove Fort has no fully functioning control room (or control room operators), as its operations are controlled remotely from Stillwater. (Tr. 32, line 5; tr. 44, lines 1-2, 8-10).

Enel also regularly assigns a team of preventative maintenance technicians to both the Stillwater and Cove Fort facilities on the same daily shift schedule. (Tr. 35, lines 11-15). All technicians report to Site Manager Ronny Brough, who is based out of Stillwater. (Tr. 35, lines 5-14; tr. 36, line 4). The technicians generally fall into one of the following three classifications (in descending order of skill set): Electrical, Mechanical and Plant. (Tr. 38, lines 5-20; tr. 40, lines 23-25; tr. 41, lines 1-19; tr. 46, lines 15-19). At the time of the hearing, Stillwater employed a

[5] Cove Fort has no solar facilities. (Tr. 59, line 1).

total of nine such technicians (some of whom were temporarily working at Salt Wells for social distancing purposes), and Cove Fort employed a total of two (with a vacant electrical technician slot). (Tr. 42, line 10; tr. 44, lines 14-24; tr. 47, lines 6, 15). The Employer assigns different operating budgets to its various facilities, such that hours billed out of Cove Fort are applied to separate work orders assigned to that facility. (Tr. 142, lines 15-16).

B. Plant Design Differences

The Stillwater and Cove Fort geothermal plants and their respective underground resources are "completely different." (Tr. 28, lines 15-17). As Mr. Platt put it, "Stillwater is much more complex than Cove Fort." (Tr. 28, line 5). The fractures surrounding Stillwater are tightly compacted, rendering water reinjection more difficult. (Tr. 29, lines 12-16). The Employer must therefore rely on injection pumps to raise the delivery pressure. (Tr. 29, lines 16-18). As a result, the process utilized at Stillwater calls for a large amount of additional attention from the operators, and different skills, training and techniques from the technicians assigned there. (Tr. 29, lines 24-25; tr.40, lines 5-6). Even the Union's witness acknowledged that "you have different components, different brand names that would need additional and different types of training." (Tr. 200, lines 9-11).

Unlike Stillwater, Cove Fort is surrounded by relatively large fractures that do not rely on the use of injection pumps. (Tr. 30, lines 1-3, 11-17). Instead, pressure drawn from pumps on the production side of the operation is sufficient to inject the water back into the ground. This process requires little control from the operators relative to the Stillwater operations. (Tr. 30, lines 5-6). Like Cove Fort, Salt Wells does not rely on injection pumps.

Cove Fort is "completely different" from Stillwater (and from Salt Wells) in another key aspect – and that is with respect to power plant design and equipment[6] utilized to drive the process. (Tr. 30, lines 17-23). Specifically, Stillwater operates on a binary cycle. (Employer Exh. 2; tr. 48, lines 3-12). Cove Fort operates on an "Ormat" design. (Employer Exh. 3; tr. 48, lines 18-22). As Mr. Platt explained, the two plants "are just fundamentally built differently." (Tr. 49, lines 3-4). The crux of that difference revolves around their respective turbine generators. (Tr. 49, lines 11-23). Put simply, Stillwater utilizes a complex high-speed machine with small turbines to support electrical generation, while Cove Fort utilizes a simpler low-speed machine with large turbines. (Tr. 49, lines 24-25; tr. 50, lines 1-25; tr. 51, lines 1-7; tr. 59, lines 6-12). Air condenser structures also vary between the two facilities. (Tr. 65, line 15).

These differences significantly impact maintenance requirements, spare parts and equipment, along with training requirements for the technicians responsible for maintaining them and tearing them down.[7] (Tr. 51, lines 8-11, tr. 59, lines 15-20). By extension, the skills, training, and qualifications assigned to Stillwater and Cove Fort technicians "are fundamentally different." (Tr. 51, lines 11-12). As Mr. Platt explained:

> [W]hen you get into the specific facilities – again, we have completely different type of equipment over there. We have different types of variable frequency drives in – in Cove Fort than we have at -- at Stillwater and Salt Wells. A different control system. Again, it – requires a – a separate kind of education and training process to bring them up to full capability at Cove Fort and if you that you – you wouldn't be able to just bring them over to Stillwater and they would start at Day 1 knowing everything. They would – they would have their fundamental background of electrical, but they wouldn't – they wouldn't be able to just walk in and do everything that a –

[6] Mr. Platt testified that the facilities use different forklifts, scissor lifts and backhoes. (Tr. 89, lines 11-14).
[7] As Mr. Platt explained in describing the training extended to Stillwater technicians vs. their Cove Fort counterparts, "Just different operating procedures, different equipment, different manufacturer. So a different manufacturer would – would come onsite with their field service support to help train and educate our people on how to properly install and remove the – high-speed turbine and the seal system that associated with it." (Tr. 59, lines 24-25; tr. 60, lines 1-4).

> that a trained electrical technician at Stillwater would do because there's unique differences between the facilities.
>
> And then there's the solar component to where the electrical technicians are also responsible for the 40 megawatts of solar generation that are attached to the Stillwater facility. So they – they would be doing maintenance on inverters and combiner boxes and all the things that are associated with the solar field that – that we just don't have at Cove Fort.
>
> * * * *
>
> It's just when you get into the specifics of the type of seals and the type of pumps and the type of turbines specifically the teardown of a turbine at Cove Fort is fundamentally different than the teardown of a – of a – of a turbine at Stillwater. So there is a specific training process and – and time – and the time that they would need to understand and – and in – and the nuances and the procedures to –to do that type of work.

(Tr. 52, lines 12-25; tr. 53, lines 1-8; 20-25; tr. 54, lines 1-2).

Mr. Platt went on to explain that training programs between the two facilities vary considerably as a result of these fundamental distinctions in plant design. (Tr. 60, lines 23-25; tr. 61, lines 1-10; tr. 122, lines 6-9).[8] The training differences between Stillwater and Cove Fort are driven by a number of factors ranging from geothermal working fluid (Isobutane vs. Pentane) to the control valves themselves. (Employer Exhs. 8, 9; 10; 11; tr. 54, lines 8-16; tr. 69, lines 15-25). Other key distinctions include operating pressures, expanders, lubrication requirements, oil pressures, and fire, evacuation, NCE, air and gas detection systems. (Tr. 54, lines 17-18; tr. 70, lines 21-25; tr. 90, lines 18-22). The facilities also operate off different qualification cards, emergency action plans and confined space training requirements. (Employer Exhs. 4, 5; tr. 62, lines 16-20; tr. 65, line 14).

[8] As Mr. Platt explained, "it's a different design process with – with different – different – different types of equipment and different operating parameters so we need to make sure they understand those." (Tr. 64, lines 2-5).

Stillwater technicians also differ from their Cove Fort counterparts to the extent that they are regularly called upon to service the three solar plants adjacent to their facility. (Tr. 66, lines 4-7). As Mr. Platt put it, "everything is – is different so you would – again, you would have to requalify, if you left Cove Fort and came over to Stillwater you would have to go through a full requalification because the plants are completely different." (Tr. 54, lines 18-22).[9] Mr. Platt also noted that the Stillwater and Cove Fort facilities operate under different power purchase agreements with different utilities in Nevada and Arizona, respectively. (Tr. 55, lines 13-21).

These distinctions have a direct mitigating impact on employee interchange beyond the impact of the distance between the two facilities. Cove Fort technicians rarely venture over to Stillwater (aside from the annual Christmas party and rare training sessions that also involve technicians in other parts of the country), due in part to their lack of training on the machinery there. (Tr. 56, lines 1-7). As Mr. Platt noted, "We – typically would not bring them over to Stillwater or Salt Wells. Because it's a – it's a different process." (Tr. 56, lines 13-14). These distinctions become apparent to technicians as soon as they embark on the orientation process.[10] (Tr. 66, lines 20-25; tr. 67, lines 1-4). Employee location may even factor into their wage rate, based on regional market analyses. (Tr. 102, line 5; tr. 152, line 22; tr. 153, lines 8-9; tr. 154, lines 1-4).

C. Geographic Separation

As the Region's Decision concedes, the distance between Cove Fort and the Fallon-based Stillwater and Salt Wells facilities is approximately 450 miles. To traverse it, one must take Interstate 15 south through Utah, connecting with U.S. Highway 50 and taking that clear across

[9] Mr. Platt underscored, "And obviously because the plants are different layout and you have a different nomenclature for what they call a pre-heater or a vaporizer or a – or – you know, a de-mister. I mean there's just all – a lot of different terminology used that they need to understand." (Tr. 61, lines 14-19).
[10] Mr. Platt estimated 30%-35% of the orientation sessions are location-specific. (Tr. 146, lines 8-17).

the state of Nevada. (Tr. 157, lines 1-4). Not only does one cross state lines in doing so, he or she also crosses over from the Mountain to the Pacific time zone. (Tr. 157, line 12; tr. 196, line 9). The drive itself takes approximately seven and one-half hours. (Tr. 157, line 15; tr. 196, line 3). Needless to say, the commute is rarely made without an overnight stay. (Tr. 157, line 19).

D. Lack of Temporary and Permanent Interchange

The facts show that there is rarely any need for Stillwater-based technicians to venture over to Cove Fort on a temporary basis, due in part to the fact that the Employer's first resort is to support any additional project needs with a trio of subcontractors. (Tr. 56, lines 24-25; tr. 57, lines 1-4; tr. 83, lines 3-4; tr. 113, line 12). Mr. Platt did testify that on rare "reactive" occasions, Stillwater-based technicians are dispatched to Cove Fort to lend a hand with temporary projects of three to four days in duration, but estimated that these events occur no more than one to three times per year.[11] (Tr. 57, lines 5-15; tr. 113, lines 8-18; tr. 114, line 11; tr. 115, lines 11-14).

The converse is even more rare, as it is virtually unheard of for Cove Fort technicians to venture over to Stillwater – except for the annual holiday party or as part of a national[12] training session which is sometimes conducted at the same time. (Tr. 56, lines 1-15; tr. 86, lines 8-25; tr. 87, line 1).[13] With a larger contingent of technicians on hand at Stillwater, there is little need to rely upon their Cove Fort counterparts for assistance. (Tr. 83, lines 14-23). As Mr. Platt put it, "in my nine years of operating these facilities that's probably happened one time that I can think of." (Tr. 83, lines 21-23; tr. 118, lines 7-13; tr. 134, lines 11-21). Union witness Beaumont

[11] Union witness Beaumont testified that this generally occurs no more than "Twice a year" for "major jobs." (Tr. 188, line 14, tr. 193, line 24). He added that a recent uptick in these figures is attributable to the fact that Cove Fort had been understaffed, with a position that remained unfilled. (Tr. 191, lines 14-20; tr. 194, lines 9, 21).

[12] Mr. Platt explained that these sessions also include employees from locations in Oklahoma City and Kansas City. (Tr. 143, lines 3-5).

[13] Mr. Platt testified that each facility has its own annual cleanup day and summer social event. (Tr. 87, lines 12-25; tr. 88, lines 1-9).

testified that, "I have not personally gone to Stillwater to perform activities," and that it had been "close to a year" since he had been there for any reason at all. (Tr. 195, lines 10-14).[14]

Control room operators have little need to make the journey over to Cove Fort, except to familiarize themselves with the operation as part of the initial orientation process. (Tr. 82, lines 13-20; tr. 116, lines 10-20). Once they have done so, "there's no reason for them to go there." (Tr. 82, lines 18-19). Mr. Platt was not even aware of whether all control room operators had been to Cove Fort as of the date of the hearing. (Tr. 117, lines 10-11).

The quality and degree of interaction between technicians and control room operators also differs substantially between Cove Fort and Stillwater. Due to their close proximity, Stillwater-based technicians regularly interact with control room operators "throughout the day." (Tr. 74, lines 23-25; tr. 75, lines 1-3). The remoteness of their Cove Fort counterparts, however, relegates them to telephonic contact on a less frequent basis that is generally confined to morning "check-ins." (Tr. 76, lines 1-19). The same is generally true with respect to interaction between Mr. Brough and the technicians under his supervision. (Tr. 77, lines 11-20).

The lack of regular supervisory contact at Cove Fort necessitates a much greater degree of relative autonomy at that location. (Tr. 78, lines 2-21). As Mr. Platt described the circumstances there, "No manager on-site they kind of have a little bit more natural flexibility to make some decisions." (Tr. 78, lines 17-19). Union witness Beaumont testified that he speaks with Mr. Brough no more than approximately "four to five times a week," and that his own schedule of assignments is "pre-planned," requiring little supervisory instruction (Tr. 197, lines 1, 15; tr. 198, lines 7-8).

[14] Mr. Beaumont added that he had never been to the Salt Wells facility. (Tr. 201, line 2).

Similarly, there is little reason for technicians at the respective facilities to interact with one another - even remotely. As Mr. Platt explained, "I don't foresee them very often calling the Stillwater technicians to ask just because their equipment's really not the same." (Tr. 111, lines 17-19). Even the Union's witness testified that he "rarely" had need to contact his Stillwater counterparts. (Tr. 186, lines 21-23).

The facts show that permanent interchange between the two facilities is virtually unheard of. In Mr. Platt's nine years of experience, he could only recall one control room operator transferring to a technician's position, even within the same facility. (Tr. 84, lines 3-7). When it came to permanent transfers across the two facilities, Mr. Platt was only able to recall a single occasion back in 2013 – involving a manager -- and another occasion several years ago involving a technician. (Tr. 84, lines 15-24; tr. 85, lines 1-24). No one to Mr. Platt's knowledge has ever transferred from Stillwater to Cove Fort, and no technician at Cove Fort has ever transferred into a control room operator position at Stillwater. (Tr. 86, line 3; tr. 128, lines 18, 22).[15]

IV. MANUAL BALLOTING ACCOMMODATIONS AND MITIGATION MEASURES

The Employer introduced a wealth of uncontroverted documentary and testimonial evidence establishing strict adherence to safety and hygiene protocols for purposes of bolstering its opposition to petitioner's request for a mail ballot election. At the outset of its argument, Enel noted that members of the petitioned-for unit had been delivering essential services on an uninterrupted basis across all facilities from the onset of the pandemic. (Tr. 209, lines 2-3). The vast majority of these employees were working side-by-side out of Enel's Fallon-area facilities,

[15] As Mr. Platt explained, "I think it's partly to do with the fact that people that work in Fallon are – a lot of them are originally from Fallon, their families are there; and so they're not interested in moving out of state. And on the other side of the coin, you have people that are from Utah that have family in Utah. (Tr. 156, lines 1-5).

both which lie within the County of Churchill – among the largest in Nevada. (Tr. 209, lines 20-23; tr. 216, line 11).

During the hearing, the Employer noted that Nevada had reported a total of approximately 4,500 positive COVID-19 results. (Tr. 209, lines 23-24). Within Churchill County, however, only 3 citizens had tested positive. (Tr. 210, line 2). Enel further asserted that these figures had been on the decline both locally, and on a state-wide basis. (Tr. 210, lines 5-6). As the Decision itself points out, Nevada ended its stay at home order effective May 15th, and was already in the process of a phased reopening at that time. (Decision, p. 9).

The Employer also introduced a host of documentary exhibits showing that it had implemented substantial measures to mitigate against the risk of exposure to COVID-19. (Employer Exhs. 12-15; tr. 209, lines 8-12). Mr. Platt testified that Enel had enacted strict protocols requiring all employees feeling ill to avoid the workplace and seek testing. (Tr. 217, lines 23-25). While at work, employees were required to adhere to strict social distancing and sanitation protocols. (Tr. 218, lines 1-5). Technicians would wear gloves at all times, while operators applied stringent wipe down procedures. (Tr. 218, lines 15-19; tr. 222, line 11). Group dining was prohibited, and hand sanitizers were issued to all employees. (Tr. 219, line 23; tr. 220, lines 7-8; tr. 222, lines 3-4). The facilities were fully secured, and outside visitors had been barred from the premises. (Tr. 219, lines 16-20; tr. 220, lines 18-20). When questioned, Mr. Platt testified that, with the possible exception of one individual, none of the employees in the petitioned-for unit were over the age of 50. (Tr. 217, lines 11-17).

Enel offered to host a manual election within a Stillwater conference room that was sufficient in size to accommodate a table, three chairs, and a voting booth, with ample space for social distancing among all participants. (Tr. 210, lines 18-24). Similar accommodations could

be made available at Cove Fort if needed. (Tr. 210, line 25; tr. 211, line 1; tr. 215, lines 9-12, 21-22; tr. 216, lines 12-25). The proposed spaces offered direct access to the polling areas. (Tr. 221, lines 9-20).

Enel added that at both facilities, it was in a position to enhance safety for voters and party representatives alike through the use of plexiglass barriers, masking, complete wipe downs, distribution of gloves and sanitizers, removal of extraneous furniture to enhance space, temperature checks, mandated testing, and even narrowing or expanding the polling periods as deemed appropriate for estimated voting units of 14 and 2, respectively. (Tr. 211, lines 1-12; tr. 226, lines 18-22; tr. 227, lines 3-14; tr. 228, lines 12-20). Enel offered to further reduce traffic in the polling area by conducting a remote ballot count. (Tr. 229, lines 7-9).

V. LEGAL ARGUMENT

A. The Regional Director Erred in Finding a Multi-Facility Unit Appropriate.

1. The Community of Interest Factors for Multi-Site Units are Well Established.

As noted at page 5 of the Decision, the Board applies a multi-faceted community of interest test to evaluate challenged multi-site petitions, taking into account a number of factors including: (1) similarity in employee skills, duties and working conditions; (2) functional integration of business operations; (3) degree of employee contact and interchange; (4) centralized control of management and supervision; (5) geographic proximity; and, (6) bargaining history. *Alamo Rent-A-Car*, 330 NLRB 897 (2000). Consequently, the Board will find a petitioned-for multisite unit inappropriate if it does not share a community of interest distinct from that shared with employees at other excluded locations. *Laboratory Corp. of America Holdings*, 341 NLRB 1079, 1082 (2004). By the same token, local autonomy of operations also militates against a multifacility unit finding. *New Britain Transportation Co.,* 330 NLRB 397, 398 (1999). Consequently, in *Esco*

Corp., 298 NLRB 837 (1990), the Board found sufficient local autonomy in the absence of a statutory supervisor assigned to a site petitioned for inclusion.

2. Employee Interchange is a Significant Factor in the Multi-Site Test.

Employee interchange (or lack thereof) is a central consideration and must be viewed contextually. *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F. 3d 41, 46-47 (1st Cir. 2002) (except for rare instance of new store openings, employees were not transferred from store in question to another store). *See also*, *NLRB v. Heartshare Human Servs., Inc.,* 108 F.3d 467, 471 (2d Cir.1997) (approving a single-facility unit where there was "no routine interchange" of employees among facilities); *First Security Services Corp.,* 329 NLRB 235, 236 (1999) ("absence of interchange between the Bridgeport Hospital guards and other guards is a critical factor"). In *Cargill, Inc.*, 336 NLRB 1115 (2001), the Board noted that factors such as local autonomy, geographic separation, and lack of substantial interchange outweighed the presence of other community of interest factors.

3. Not All Forms of Contact Are Treated Equally.

As the Board noted in *New Britain Transportation Co*., s*upra* at 398 (1999), not all forms of employee contact are deemed to be "interchange." Rather, it is incumbent on the party at issue to establish "that a significant portion of the work force is involved and that the work force is actually supervised by the local branch." *Id.* at 398. *See also, Purolator Courier Corp*., 265 NLRB 659, 661 (1982) (interchange established where 50 percent of the work force came within the jurisdiction of other branches on a daily basis and there existed a greater degree of supervision from supervisors at other terminals than from supervisors at their own terminals).

The Board generally considers permanent transfers to be less indicative of multifacility integration relative to temporary transfers. *Red Lobster*, 300 NLRB 908, 911 (1990). In *Courier*

Dispatch Group, 311 NLRB 728 (1993), however, the Board found that brief and temporary substitution of employees from one facility for those of another "does not constitute 'interchange' or temporary transfer" to begin with. In *Alamo Rent-A-Car*, supra, the Board noted that evidence of a single temporary transfer was insufficient, combined with the absence of a formalized transfer "system," to support a multi-facility finding. *Id*. at 898. Likewise, in *New England Telephone & Telegraph Co*., 249 NLRB 1166, 1167 (1980), one temporary transfer over the course of a single year was deemed to be insignificant employee interchange.

4. Interchange is Contextual.

The Board has consistently weighed the presence or absence of interchange against the backdrop of other community of interest factors – not least of which is geographic separation. Consequently, in *New Britain Transportation Co., supra* at 398, the Board noted that a six-mile distance between facilities, "while not determinative, gains significance where, as here, there are other persuasive factors supporting the single-facility unit." *See also*, *Bowie Hall Trucking*, 290 NLRB 41, 43 (1988) ("although the geographic separation of the terminals is not determinative in view of the nature of the Employer's operation…we find that this factor gains significance when, as here, there are other persuasive factors that support a single-facility unit").

The Board has further found that minimal employee interchange combined with a lack of meaningful contact between employees at two separate facilities may diminish the significance of functional integration (and even close proximity) between those facilities. *J&L Plate,* 310 NLRB 429 (1993). *See also, Hilander Foods*, 348 NLRB 1200, 1203-1204 (2006) (only three instances of temporary transfer between stores over more than a year period and 8 or 9 permanent transfers over 3-year period deemed insufficient); *Macy's West, Inc.,* 327 NLRB 1222, 1223 (1999) ("record contains minimal evidence of transfers in or out of the maintenance department"); *Exemplar, Inc.,*

363 NLRB No. 157, slip op. at 5 (2016) ("As found by the Acting Regional Director, the record does not establish that the absence of employee interchange and functional integration is attributable to the distance between facilities or any resultant difficulty in transporting employees between the facilities.").

5. There is a Profound Lack of Interchange in this Case.

The Regional Director closes her analysis of employee contact and interchange by stating that, "As a result of the distance between the facilities, temporary interchange between Stillwater and Cove Fort technicians will not occur. Some permanent interchange has taken place; approximately five years ago a technician from Cove Fort transferred to Stillwater." (Decision, p. 4). If anything, the Region has downplayed the dearth of both temporary and permanent interchange in this case.

Indeed, the record is virtually bereft of any meaningful evidence of employee interchange. To the contrary, the facts show virtually no temporary interchange whatsoever. Extensive reliance on subcontractors operates to substantially reduce the need for Stillwater technicians to travel to Cove Fort except in isolated, "reactive" situations lasting no more than 3-4 days at a time and occurring no more than one to three times annually. (Tr. 56, lines 24-25, tr. 57, lines 1-15; tr. 83, lines 3-4; tr. 113, lines 8-18, tr. 114, line 11; tr. 115, lines 11-14). Even telephonic contact between technicians at the two facilities is relatively rare. (Tr. 111, lines 17-19; tr. 186, lines 21-23).

Cove Fort technicians only venture to Stillwater for the annual holiday party or as part of a national training session. (Tr. 56, lines 1-15; tr. 86, lines 8-25; tr. 87, line 1). Control room operators may visit Cove Fort one time at the outset of their employment, never to return. (Tr. 82, lines 13-20; tr. 116, lines 10-20). Otherwise, they are relegated to abbreviated telephonic "check-

ins." (Tr. 76, lines 1-19). Lack of on-site supervision at Cove Fort confers a significant degree of autonomy on the technicians stationed there. (Tr. 77, lines 11-20; tr. 78, lines 2-21).

Permanent interchange between the two facilities is all but non-existent. The record reveals only a single technician transfer from Cove Fort to Stillwater approximately seven years ago. (Tr. 84, lines 15-24; tr. 85, lines 1-24). No one has ever transferred from Stillwater to Cove Fort, and no technician at Cove Fort has ever transferred into a control room operator position at Stillwater. (Tr. 86, line 3; tr. 128, lines 18, 22). As the Board found in *Cargill, Inc.*, 336 NLRB 1115 (2001), this profound absence of interchange, when combined with local autonomy and substantial geographic separation, outweigh other community of interest factors.

6. Similarity of Skills Contemplates a Corresponding Similarity in Training That is also Lacking in this Case.

The Regional Director summarily concluded that the Stillwater and Cove Fort technicians share a similarity in skills, duties and working conditions that "strongly supports finding a community of interest exists." (Decision, p. 6). In so finding, the Region completely disregarded an extensive number of factors distinguishing not only the designs of the plants themselves, but by extension the skills, duties and conditions of the technicians servicing them.

Indeed, the record is replete with examples of fundamental differences in plant design that call for vastly different training and operational requirements between the two facilities. The unique aspects of the terrain surrounding Stillwater impose operational complexities that are foreign to Cove Fort. (Tr. 28, lines 5, 15-17; tr. 29, lines 16-18). As a result, Stillwater technicians are called upon to exercise vastly different skills, training, and techniques. (Tr. 29, lines 24-25; tr. 40, lines 5-6). From the point of orientation onward, a technician's experience differs substantially depending on location, as do wage rates. (Tr. 66, lines 20-25; tr. 67, lines 1-4; tr. 102, line 5; tr. 152, line 22; tr. 153, lines 8-9; tr. 154, lines 1-4).

These factors also mandate fundamental differences in plant design and equipment that have a profound impact on technician skills, training, and qualification requirements. (Tr. 30, lines 17-23; tr. 51, lines 8-12, tr. 59, lines 15-20; tr. 60, lines 23-25; tr. 61, lines 1-10; tr. 122, lines 6-9). Consequently, the day-to-day experience of a Cove Fort technician may vary substantially from their Stillwater counterpart when it comes to working fluid, control valves, operating pressures, expanders, lubrication requirements, oil pressures, solar plants (in the case of Stillwater only) and fire, evacuation, NCE, air and gas detection systems, as well as emergency action plans. (Employer Exhs. 4, 5, 8, 9; 10; 11; Tr. 54, lines 8-18; tr. 62, lines 16-20; tr. 65, line 14; tr. 66, lines 4-7; tr. 69, lines 15-25; tr. 70, lines 21-25; tr. 90, lines 18-22).

7. The Vast Distance Separating Stillwater and Cove Fort is Virtually Unprecedented Among Those Cases Finding in Favor of a Multisite Unit.

Scouring the cases for analogous fact patterns, one is hard-pressed to find authority supporting combination of two locations separated by anything close to the distance at issue in this case. To the contrary, an overwhelming majority of decisions find in favor of a single-site units in the presence of shorter distances than those present in this case by a factor of five to ten.

In *Centurion Auto Transport, Inc.,* 329 NLRB 394 (1999), the Board found that truck drivers at a customer service center constituted an appropriate bargaining unit, despite claims that it should include a trio of satellite centers located 45, 50 and 75 miles away, due in part to a lack of interchange. In *We Care Transportation, LLC*, 353 NLRB 65 (2008), the Board was willing to overlook a distance of 194 miles between facilities, but only due to the nature of the employer's transportation business, which allowed for virtually constant interchange. Similarly, in *Trane*, 339 NLRB 866 (2003), the Board noted that, "we would generally consider a geographic distance of [only] 108 miles between facilities significant," ruling in favor of a multi-site unit only upon

finding that employees at both locations were dispatched from their homes, rarely going into their respective offices, along with evidence of regular interchange.

Consequently, the facts in the instant case bear a more striking resemblance to those in *Lumber Fabricators, Inc.,* 110 NLRB 187 (1954). In that case, two plants manufacturing related products were also separated by approximately 450 miles, sharing a single payroll department, centralized labor relations, and minimal evidence of interchange. Consequently, the Board concluded that, "In view of the geographical separation of the two plants, the lack of a substantial interchange of employees between them, the separate immediate supervision of the employees of the Clarksville plant, and the absence of any bargaining history for the employees of that plant, we believe that the production and maintenance employees of the Clarksville plant may constitute a separate appropriate unit." *Id*. at 188.

8. The Cases Introduced by Petitioner Are Completely Inapposite.

Throughout the entire hearing, Petitioner only introduced a pair of documentary exhibits, ostensibly as precedential authority. (Union Exhs. 1 and 2). Neither of those cases, however, have any bearing whatsoever on the instant proceedings. Union Exh. 1 is a 2010 Decision and Direction of Election issued by Region 20 in connection with *TransCanada USA Services, Inc.,* Case No. 20-RC-18282. Although the case was not the product of a Board decision (or even a contested election on the underlying multi-employer issue), Petitioner suggested the case was relevant to the extent that it involved the same union.

Of course, the case cannot be relevant upon the issue of bargaining history as it has no nexus whatsoever to the Employer. More importantly, the facts of the case are inapposite on multiple levels. The issue in *TransCanada* turned upon the question of whether to include a trio of unrepresented pipeline workers within a pre-existing multi-facility unit consisting of 55 pipeline

workers, through the mechanism of an *Armour-Globe* self-determination election. The actual geographic scope of that unit was never litigated[16] and, in any event, the facts (encompassing a group of pipeline employees working side-by-side rather than out of separately established production facilities) are completely distinguishable from those of the instant case.

Petitioner also introduced what appears to be a 2016 Notice of Election involving the same employer, TransCanada Services, issued by Region 14 in case no. 14-RC-189861. (Union Exh. 2.) Based on the voting unit description, the case appears to involve another comprehensive unit of pipeline workers. There is no indication, however, as to whether this Notice was the product of a contested election yielding a Regional decision, or simply a stipulated election agreement (Petitioner failed to offer any testimony clarifying this question). More importantly, however, this so-called "authority" suffers from the same deficiencies as Union Exhibit 1 and must be disregarded for that reason as well.

As the Employer underscored at the hearing, the facts of the instant case are far more analogous to the Board's decision in *Dixie Belle Mills*, 139 NLRB 629 (1962). In that case, the Board rejected a multi-site petition attempting to combine two plants that were no more than 20 miles apart. (Tr. 244, lines 5-10). In so holding, the Board noted that this geographic separation added to a lack of substantial interchange and bargaining history.

B. The Regional Director Abused Her Discretion in Directing a Mail Ballot Election.

1. The Board Has Traditionally Expressed a Preference for Manual Ballots.

The Board has long made clear its preference for conducting representation elections on a manual basis. In what remains the lead decision on this issue, the Board made clear that there are

[16] To the contrary, the facts show that the dispute in *TransCanada* was confined to the employer's contention that the petition itself was untimely, and that the parties had previously agreed to confine the unit to exclude the three employees at issue by prior stipulation.

only three specific circumstances that suggest the propriety of using mail ballots. *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

The first circumstance involves a "scattering" of eligible voters over a wide geographic area due to their job duties. The second involves a scattering of work schedules that vary significantly, such that voters are not present at a common situs at the same time. The third involves situations in which a strike, lockout or picketing is in progress. *Id*. at 1145.

In the absence of these circumstances, the Region retains discretion to direct a mail ballot election *only* in the presence of "extraordinary circumstances" – which by its terms is confined to "circumstances that would tend to make it difficult for *eligible employees* to vote in a manual election," such that it "would enhance the opportunities *for all to vote*." Id. at 1144 (emphasis added). Consequently, the Board has made clear that the Region's discretion is not "unfettered." Rather, it must specifically find that mail balloting is needed *to enhance voting opportunities*. By the very nature of the representation process, this concept would seemingly exclude individuals who are not eligible to vote – including Board agents and party representatives.

The Board's own CaseHandling Manual underscores this point. Indeed, Section 11301.2 makes clear that the Regional Director must "reasonably conclude that conducting the election by mail ballot…would enhance the opportunity of all to vote." This Section 11301.2 also makes clear that, "the Board's longstanding policy is that representation elections should, as a general rule, be conducted manually," and that, "the best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises."

2. The Manual Ballot Preference is Anchored in Fundamental Policy.

The Board's long-standing preference for manual balloting is rooted in sound labor relations and electoral policy. As it pointed out in *Mission Industries*, 283 NLRB 1027 (1987),

mail ballot elections are "more vulnerable to the destruction of laboratory conditions than are manual elections." In *Thompson Roofing, Inc.,* 291 NLRB 743 at fn. 1 (1988), the Board explained that, manual balloting alone enables the agency to personally preside over the election, protect ballot secrecy, guard against partisan influence, and otherwise take those steps necessary to uphold the integrity of the representation process.

The courts have consistently embraced this view. In *Shepard Convention Services v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996), the court made clear that manual ballots encourage maximum voter participation. Within the dissent of *San Diego Gas & Electric* itself, Members Hurtgen and Brame noted that average voter participation in manual ballot elections is approximately 87.9%, whereas in mail ballot cases, that figure declines to 68.1%. *Id*. at 1150. A host of factors contribute to these results, ranging from historically inaccurate mailing addresses for those living in rental units to general deficiencies in mail delivery – which can be exacerbated during times of crisis when residents are often displaced.

3. The Primary Stakeholders Demonstrated their Ability to Vote Safely.

As essential service workers, the eligible voters in this case have continued to report for duty throughout the pandemic, maintaining proper social distancing practices and related safety protocols along the way. (Tr. 209, lines 2-3). As established in Employer Exhibits 12 through 15, the Employer has implemented substantial measures to mitigate against the risk of exposure to COVID-19. Enel employees have routinely applied aggressive preventive practices that extend beyond social distancing to include extensive wipe down procedures, glove protocols and hand sanitizers. (Tr. 218, lines 15-19; tr. 219, line 23; tr. 220, lines 7-8; tr. 222, lines 3-4, 11).

At the time of the hearing, Enel noted that its primary operations in Fallon lie within the seat of Churchill County – among the largest counties in Nevada. (Tr. 209, lines 20-23; tr. 216,

line 11). The entire state had reported approximately 4,500 cases as of that point in time (figures that had been declining), yet Churchill County had only reported a total of three positive test results, standing in stark contrast to other portions of the country. (Tr. 209, lines 23-24, tr. 210, lines 2-6). As the Regional Director herself points out, Nevada was well into the process of a phased reopening at the time of her decision. (Decision, p. 9). Unlike other circumstances in which the Regions have directed mail ballots over the course of the pandemic, it is also worth noting that the size of the bargaining unit is relatively small by comparison.

During the hearing, the Employer proposed to conduct a manual ballot election within a conference room that that is approximately 400 square feet in size, sufficient to accommodate a table, three chairs with more than six feet of space between them, and a hallway entrance that could be utilized to sufficiently separate voters on their way into the polling area. (Tr. 210, lines 18-24). Similar accommodations were identified at the Cove Fort facility for the two potential voters there. (Tr. 216, lines 9-25; tr. 217, lines 1-3). The Employer offered to erect plexiglass barriers to further separate the election officer and observers from eligible voters at check-in, and to clear the polling area of all fixtures to allow for maximum distancing. (Tr. 211, lines 1-12). As Enel pointed out, every reasonable precaution could be taken to ensure against even the remote possibility of infection – including the distribution of masks, gloves, and hand sanitizers, and if deemed necessary, temperature checks and mandated testing. (Tr. 226, lines 18-22; tr. 227, lines 3-14; tr. 228, lines 12-20).

4. The Region's Decision Must be Overturned as a Matter of Board Policy.

The Regional Director suggests that a strong argument could be made to conduct mail balloting at Cove Fort solely by virtue of its remote location and relatively small size. (Decision, p. 9). Neither of these factors, however, are compelling within the context of a petition seeking a

multi-site unit. Indeed, if one took this argument to its logical extreme, then virtually any multi-site case involving "remote" locations would warrant mail balloting – particularly when "small" in size. The Board, however, has consistently rejected such arguments in favor of a general policy supporting manual ballot elections.

Even assuming arguendo that the Region could support those contentions, however, it remained free to direct a mixed manual election, confining mail ballots to the two technicians at Cove Fort, while proceeding with a manual ballot election at Stillwater. The Regional Director herself acknowledged "that a mixed mail and manual election may well have been appropriate under normal circumstances." (Decision, p. 9). She further acknowledged that COVID-19 did "not appear widespread" within Churchill County. *Id*.

Nonetheless, the Region directed a mail ballot election at Stillwater based on two articulated reasons – both of which revolved around travel considerations that were unique to Board agents and party representatives who by their nature were not eligible voters. In doing so, the Region failed to properly avail itself of the limited exception specified *within San Diego Gas & Electric*, which as set forth above, is confined to "circumstances that would tend to make it difficult for *eligible employees* to vote in a manual election," such that it "would enhance the opportunities *for all to vote*." Id. at 1144 (emphasis added).

Specifically, the Region noted that a manual ballot election "would, at a minimum, require a Board agent and party representatives to travel to Fallon. Fallon is remote, and whether it is a Board agent traveling from Oakland, California, or party representatives travelling from their homes, it seems inevitable that significant travel would be involved to reach Fallon." (Decision, p. 9). While the Region makes the point that such travel could also put voters at risk of infection, the fact remains that the Employer fully established its ability to carry out the voting process in a safe and hygienic manner. Moreover, the Board has held that distance from the Region is not a salient consideration. *See, e.g.,*

Willamette Industries, Inc., 322 NLRB 856 (1997) (finding abuse of discretion in directing mail ballot based solely on employer distance from Board office).

The Regional Director went on to suggest that manual balloting at Fallon would inevitably compel the assigned Board agent to engage in "travelling between locations." (Decision, p. 10). She added that, "it seems self-defeating to have employees coming together, or a Board agent and others traveling between facilities." *Id*. This suggestion assumes not just one false premise, but potentially two. First, there was never any suggestion that the Region assign the same Board agent to cover two manual elections at facilities that are 450 miles apart. Given the resources available to the Region (and potentially others in closer proximity), presumably it could have divided those responsibilities up among multiple election officers. Second, it also negates the possibility of a mixed manual election which, as the Regional Director herself acknowledged, remained a viable option.

5. The Decision to Direct Mail Ballots Potentially Disenfranchised Two Eligible Voters – Either of Whom Could Have Been Independently Determinative.

It is worth underscoring that a pair of unique considerations in this case render the mail ballot question not just a theoretical concern, but a practical one with real world ramifications for all stakeholders involved. To begin with, the outcome of the election was decided by the margin of a single voter (7 to 6 in favor of Union representation). Needless to say, voter turnout proved to be decisive. If the Region could point to full voter turnout, then perhaps the concern would remain a theoretical one. Unfortunately, however, that proved not to be the case.

The Employer filed a preliminary voter list in this case containing the names of sixteen eligible voters. (Board Exh. 3). Attrition within the bargaining unit subsequently reduced that figure to fifteen. Only 13 ballots were ultimately cast, however, leaving a discrepancy of two ballots. Against the backdrop of a one-vote margin, either (or both) of those ballots could have proven to be determinative of the outcome.

VI. CONCLUSION

For all the foregoing reasons, the Board should grant the Employer's request for review in its entirety.

Respectfully submitted,

/s/ Steven Bernstein

Steven M. Bernstein
FISHER & PHILLIPS LLP
Bank of America Building
101 E. Kennedy Blvd.
Suite 2350
Tampa, Florida 33602
Telephone: 813-769-7500
Facsimile: 813-769-7501

Counsel for Employer
Enel North America, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENEL NORTH AMERICA, INC.	)	
	)	
Employer,	)	
	)	
and	)	**CASE NO.: 32-RC-259399**
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245,	)	
	)	
Petitioner.	)	
	)	

CERTIFICATE OF SERVICE

I certify that I have served, this 15th day of July 2020, on the following individuals, via electronic mail at the email addresses set forth below, a copy of the foregoing **Request for Review of the Employer:**

Alex Pacheco
Counsel
IBEW Local 1245
30 Orange Tree Circle
Vacaville, CA 95687
Ajp3@ibew1245.com

Rick Thompson, Organizer
IBEW Local 1245
30 Orange Tree Circle
Vacaville, CA 95687
Rct8@ibew1245.com

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300 N
Oakland, CA 94612-5224
Valerie.hardy-mahoney@nlrb.gov

/s/ Steven Bernstein /
Steven M. Bernstein
Counsel to Employer Enel North America, Inc.